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72-568

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-568

WESLEY KRAUDE, M.D.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Appeal From the United States District Court, Central District of California, Hon. Jesse W. Curtis, Judge.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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WESLEY KRAUDE, M.D.,

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UNITED STATES OF AMERICA,

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Appeal From the United States District Court, Central District of California, Hon. Jesse W. Curtis, Judge.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Wesley Kraude, M.D., respectfully prays that a Writ of Certiorari issue to review the Decision and the Judgment of the United States Court of Appeals for the Ninth Circuit, which was filed on August 21, 1972.

I.

The Opinion Below.

The Opinion of the Court of Appeals for the Ninth Circuit is printed as Appendix A hereto. There is no official citation to the opinion at this time.

II.

Jurisdiction.

The opinion of the Court of Appeals was filed on August 21, 1972. Thereafter, Petitioner filed a Petition for a Rehearing with the Court of Appeals, which was denied on September 13, 1972. A copy of the Order denying the Petition for Rehearing is attached hereto as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

Questions Presented.

The questions presented on this Petition for a Writ of Certiorari are two, namely:

1. Was Petitioner deprived of his constitutional guarantee to a fair and impartial jury trial [U.S. Constitution, Amendment VI] by reason of the fact that one of the jurors concealed from both the Court and counsel the fact that she had been employed by the Los Angeles Office of the Department of Justice, the very agency that was prosecuting Petitioner?

2. Whether Petitioner's submission of Medicare forms to Occidental Life Insurance Company, a private corporation, which was completely in charge of administering the Medicare program, was a matter within the "jurisdiction" of an agency or Department of the United States Government as that term is used in 18 U.S.C. § 1001? Stated another way, do the acts charged in the Indictment constitute a violation of 18 U.S.C. § 1001?

IV.

The Constitutional and Statutory Provisions Involved.

The Constitutional provision involved is that portion of the United States Constitution, Amendment VI, which in pertinent part states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury . . .*" (Emphasis added).

The statutory provision involved is 18 U.S.C. § 1001, which states:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

V.

Statement of Case.[1]

Dr. Kraude is a medical doctor specializing in psychiatry. During the years 1966 to 1967, he was engaged in treating geriatric patients who were covered by the Federal Medicare program [42 U.S.C. § 1395 *et seq.*]. In the Los Angeles, California area, where Dr.

[1]This Statement of the Case has been abbreviated in order that this Court will not be burdened with factual detail not essential to the disposition of the questions here presented.

Kraude practices, Occidental Life Insurance Company (Occidental), a private corporation, pursuant to an agreement with the Secretary of Health, Education and Welfare was designated to handle the Medicare program. Accordingly, in seeking payment for services he rendered to each of his patients covered by the Medicare program, Dr. Kruade submitted to Occidental a document entitled "Request for Medicare Payments".

In 1971, Dr. Kraude was charged in a 29 Count Indictment for violating 18 U.S.C. § 1001 during the years 1966-1967. Each count of the indictment alleged that Dr. Kraude submitted to Occidental, which acts as the paying agent for the Social Security Administration, a document entitled "Request for Medicare Payments," which sought payment for psychiatric treatment, when in fact he had not rendered the medical service.

Dr. Kraude plead not guilty to each Count of the Indictment, and the matter was set for a jury trial.[2] The jury found Dr. Kraude guilty on eleven counts and not guilty on seven counts. Because the jury could not reach a verdict on the remaining count, it was dismissed at the Government's request.

Following the jury's verdict, Petitioner's trial counsel, Richard R. Rogan, had a telephone conversation with Juror No. 2, Mary J. Campbell. In this conversation,

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[2]At the commencement of the trial, but before the selection of the jury began, the Government dismissed nine counts; and prior to the submission of the case to the jury, the Government dismissed another count.

Juror Campbell told Mr. Rogan that she had been employed by the Los Angeles Office of the United States Department of Justice (which was the very agency that was prosecuting Petitioner). In support of Petitioner's Motion for a New Trial, Mr. Rogan filed an affidavit, which in pertinent part stated:

> "Juror No. 2, Mary J. Campbell, spoke by telephone to affiant on December 8, 1971, and asked affiant if he was related to Nat Rogan, former District Director of Internal Revenue in Southern California. Said Juror further informed affiant that she had been employed in the Los Angeles Office of the United States Department of Justice and for a number of years had been employed by the Federal Government."

After the denial of Petitioner's Motion for a New Trial, the Court referred the matter to the Probation Office for a pre-sentence report. The Court then sentenced Petitioner to three years on each count to run concurrently. The Court, however, suspended sentence and placed him on probation for a period of five years on the condition that he serve six months in a jail-type institution, and that he pay a fine of $15,000.00. A copy of the Judgment is attached hereto as Appendix C.

VI.

Argument.

A. Petitioner Was Deprived of His Constitutional Guarantee to a Fair and Impartial Jury Trial Because Juror Mary J. Campbell Concealed the Fact That She Had Been Previously Employed by the Los Angeles Office of the United States Department of Justice, the Very Agency That Was Prosecuting Petitioner.

1. The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury. The guarantee is to *twelve* impartial jurors.

Baker v. Hudspeth, (1942) 129 F. 2d 779;
Smith v. U.S., (1941) 12 F. 2d 217.

2. During the *voir dire* examination of the jury, all members of the jury, including Juror Campbell, were asked:

> "Is there anyone else who is employed by the United States Government now or has been in the recent past." [R.T. p. 25, lines 23-24].[3]

The Court then inquired of Juror Campbell as to the following:

> "THE COURT: Mrs. Campbell, where do you live?
>
> VENIREMAN CAMPBELL: Los Angeles.
>
> THE COURT: You have a smile on your face. Is your husband a doctor?
>
> VENIREMAN CAMPBELL: No, sir.
>
> THE COURT: Well, I thought you were anticipating an early excuse. Do you work outside the home, Mrs. Campbell?

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[3]The letters "R.T." have reference to the citation to the page and line of the Reporter's Transcript in this matter.

VENIREMAN CAMPBELL: No, I stay at home.

THE COURT: What does your husband do?

VENIREMAN CAMPBELL: He is deceased.

THE COURT: Did you hear all the questions I asked a while ago?

VENIREMAN CAMPBELL: Yes, I did.

THE COURT: And would your answers be in the negative in all respects?

VENIREMAN CAMPBELL: Yes.

THE COURT: You wouldn't have any different answers?

VENIREMAN CAMPBELL: No, I would not." [R.T. p. 44, line 12, to p. 45, line 7].

3. It is submitted, that the tenor of the Trial Court's *voir dire* examination required Juror Campbell to reveal her employment by the Los Angeles Office of the Department of Justice. Among other things, a juror owes a duty to the Court and to counsel where he is being examined regarding his qualifications to serve as a juror, to answer truthfully, fully and fairly all questions asked upon examination. Furthermore, a juror should, whether specifically questioned or not, disclose any material information which might bear upon his qualifications. Otherwise, neither the Court nor counsel can determine his qualifications to serve as an impartial juror (*United States v. Lampkin*, (1946) 66 F. Supp. 821, 823-824).

In *United States v. Lampkin, supra*, the Court succinctly stated the above rule as follows at pages 823-824:

"In a jury trial, if justice is to be even approximated, the jurors must be absolutely im-

partial and fair-minded and be governed by the evidence which is given by the witnesses sworn and examined before them, and by the law as stated by the court. The purpose of the examination by each juror, touching his qualifications, is to enable the court and the interested parties to ascertain whether a cause for challenge exists and whether it is advisable to exercise the right of challenging a juror, peremptorily or otherwise. The reason the law gives to each party peremptory challenges is to enable both sides in the trial of the lawsuit to secure a jury which all may feel is reasonably free, among other things, from many bias or prejudice. It may fairly be said to be the rule that a juror owes the duty to the court and to those who are interested in the case being tried, where he is being examined touching his qualifications to serve as a juror, to answer truthfully, fully and fairly all questions asked upon the examination to determine his qualifications to serve as a fair and impartial juror, to the end that challenges may be intelligently exercised and unsuitable persons may be excused from serving as jurors, in the case. The juror should, of course, whether specifically questioned or not, disclose any material information which might bear upon his qualifications. . . .

"A juror does not possess the right to pass upon the question of what is or what is not deemed material by the court, or the litigants, touching his qualifications to serve in a particular case. That prerogative rests with the court.

"It is the duty of a juror to make full and truthful answers to all questions propounded to him touching his qualifications to serve as a juror in

> any case, since full knowledge of all material relevant matters is essential to the fair and just exercise of the right to challenge, either peremptorily or otherwise. A juror who falsely conceals a material fact relevant to his qualifications is guilty of such misconduct as is prejudicial and obstructive to the fair administration of justice in our courts. If the time ever comes when the court is deprived of the power to make prospective jurors truthfully disclose material facts regarding themselves and their qualifications to serve as fair and impartial jurors, effective administration of justice will be greatly impeded."

In light of the above authority, and in light of the circumstances of this case, it is submitted that Juror Campbell's misconduct warrants a reversal of the judgment. Her failure to disclose her former employment by the very agency that was prosecuting Petitioner deprived both the Trial Court and Petitioner's trial counsel from inquiring as to whether she had the requisite state of mind to judge the case fairly and impartially.[4] Moreover, using hindsight, it can be inferred that her failure to disclose such employment demonstrates that she did not have the requisite state of mind to judge the case fairly and impartially. In the words of the *Lampkin* case, "the juror should, of course, whether specifically questioned or not, disclose any material information which might bear upon his qualifications, . . ." This, Juror Campbell failed to do, thereby depriving Petitioner of his Constitutional guarantee to a trial by a fair and impartial jury.

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[4]In all likelihood had Petitioner's trial counsel known of juror Campbell's former employment by the Los Angeles Office of the

(This footnote is continued on next page)

B. As a Matter of Law, the Acts Charged in the Indictment Do Not Constitute a Violation of 18 U.S.C. Section 1001 in That No Documents Were Submitted Concerning a Matter Within the "Jurisdiction" of an Agency or Department of the United States Government.

1. The elements necessary for imposing liability under § 1001 are that the writing must concern a matter within the jurisdiction of an agency or department of the U.S. Government, that the statement be false, that the maker know it to be false, and that the statement be made knowingly and willingly.

United States v. Adler, (1965) 380 F. 2d 917;
United States v. Stephens, (1970) 315 F. Supp. 1008, 1010.

2. The term "jurisdiction," as used in § 1001, means that the writing will be transmitted to the agency or department, and that it will act on the information contained in the writing.

United States v. Adler, supra, 380 F.2d 917, 922;
Friedman v. U.S., (1967) 374 F. 2d 363, 366.

3. The determination of whether a writing concerns a matter within the "jurisdiction" of a department or agency presents a question of law, rather than one of fact.

United States v. Adler, supra, 380 F. 2d 917;
Gonzales v. U.S., (1960) 286 F. 2d 118, 123;
United States v. Stephens, supra, 215 F. Supp. 1008, 1010.

Department of Justice he would have challenged her either for cause or would have exercised one of his peremptory challenges.

4. In the case at bar, the Medicare form prepared by Dr. Kraude was never submitted to the Social Security Administration, nor was the Social Security Administration or any other agency or department of the United States Government required to act upon the information contained in the form. Rather, the entire administration of the Medicare program, for the area here in question, was designated to Occidental, which is neither an agency nor department of the U.S. Government. In this regard, the evidence shows:

(a) Pursuant to an agreement with the Secretary of Health, Education and Welfare, Occidental was designated to handle the Medicare program with regard to the counties of Los Angeles and Orange in the State of California [R.T. p. 82, line 25, to p. 83, line 17, which is reproduced in Appendix D hereof].

(b) All "Request for Medicare Payment" forms were submitted to Occidental. After the forms were received, Occidental submitted them to their Claims' Examiners for review. Payments were than made by Occidental either to the physician (if there had been an assignment of benefits), or to the patient (if there had not been an assignment of benefits). Accompanying Occidental's check, was an "Explanation of Benefit" form prepared by Occidental explaining how it computed the amount of payment [R.T. p. 86, line 23, to p. 88, line 6, which is reproduced in Appendix E hereof].

(c) All disputes with regard to the payment of Medicare benefits were handled by Occidental [R.T. p. 93, lines 6-15; p. 96, line 21, to p. 97, line 5, which is reproduced in Appendix F hereof].

5. From the foregoing, only one conclusion can be drawn, namely: that Occidental, a private corporation,

was completely in charge of administering the Medicare program for the area here in question. It is evident that no information was ever submitted or required to be submitted to a governmental department or agency, upon which information that agency or department was required to act in administering the medicare program. Absent this essential ingredient for imposing liability under § 1001, the Government, as a matter of law, has failed to prove its charge that Dr. Kraude was guilty of violating 18 U.S.C. §1001.

Conclusion.

For the reasons set forth herein, it is respectfully requested that a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Plaintiff-Appellee*, vs. Wesley Kraude, M.D., *Defendant-Appellant*. No. 72-1584.

[August 21, 1972].

Appeal from the United States District Court for the Central District of California.

Before: MERRILL and KILKENNY, Circuit Judges and TAYLOR, District Judge*.

TAYLOR, District Judge:

The appellant, Wesley Kraude, a psychiatrist, has appealed from his conviction on 11 counts of a 29 count indictment for violating 18 U.S.C. §1001.[1] Appellant was fount not guilty on seven counts and 11 counts were dismissed by the Government, nine before trial, one before the case was submitted to the jury and one after trial when the jury failed to agree on that count.

A motion for a Judgment of Acquittal was made at the close of the government's case and denied. Following denial of appellant's motion for a new trial, he was

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*The Honorable Fred M. Taylor, Senior United States District Judge, District of Idaho, sitting by designation.

[1]18 U.S.C. §1001 reads as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudu lent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

sentenced to three years' imprisonment on each of the 11 counts to run concurrently. The court suspended the sentences and placed the appellant on probation for a period of five years and as one condition of probation that he must serve six months in a jail-type institution. In addition, appellant was fined in the amount of $15,000.00.

Each count of the indictment alleged appellant submitted false requests for medicare payments to Occidental Life Insurance Company, which company was acting as the paying agent for the Social Security Administration.

Appellant's initial contention is that the term "jurisdiction", as used in 18 U.S.C. §1001, means that the writing will be transmitted to the agency by the defendant, and that the agency will act on the information contained in the writing. It is argued that since the medicare forms were transmitted by appellant to a private carrier (Occidental Life Insurance Co.) and not directly to the Department of Health, Education and Welfare, the jurisdictional requirements of §1001 were not met. The record reveals that the Department of Health, Education and Welfare, through the Social Security Administration, entered into a written contract with Occidental to handle the medicare forms and determine payment to doctors. In effect, Occidental was an agent of the Department of Health, Education and Welfare for this specific purpose. Furthermore, in *Ebeling v. United States,* 248 F.2d 429, 434 (8th Cir. 1957), in a similar situation, the court held that the transmittal did not have to be directly to the agency or department to be within the jurisdictional requirement of §1001, so long as it had a material effect on the department or agency function. See also *Kuenstler v. Occidental Life Insur-*

ance Co., 292 F.Supp. 532 (D.C.C.D. Cal. 1968). We are of the opinion that the term "jurisdiction" as used in 18 U.S.C. §1001 covers a situation such as the one here.

Appellant's second contention is that the court committed reversible error in failing to instruct the jury as to the meaning of the term "jurisdiction". The record shows that counsel for the defendant was given an opportunity to object to the instructions prior to and after they were given to the jury and no objection was made in regard to the failure of the court to instruct the jury as to the meaning of the term "jurisdiction". Since no objection was made at the trial level, appellant is foreclosed from raising this issue for the first time on appeal. Rule 30, F.R.Cr.P.; *White v. United States*, 394 F.2d 49 (9th Cir. 1968).

The third contention argued by appellant is that as a matter of law the evidence was not sufficient to support the defendant's conviction. After carefully reviewing all the evidence produced at the trial, considered in a light most favorable to the government, together with the reasonable inferences which may be drawn therefrom, we are convinced that the evidence is amply sufficient to support the conviction. See *Kaplan v. United States*, 329 F.2d 561 (9th Cir. 1964).

Appellant further contends that the government's cross-examination of the defendant's character witness, Rachel Page, had the cumulative effect of depriving the defendant of a fair trial.[2] Appellant argues that the

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[2]This contention is based on the following questions asked of the witness on cross-examination by the prosecutor:

1. "Well, had you heard before coming to court today that the defendant was suspended from Medical on March 11, 1968, for overutilization[1]" [R.T. 595]

(This footnote is continued on next page)

interrogation by the prosecution, in regard to reports or rumors of wrongful acts or misconduct engaged in by the defendant, was not done in good faith since the prosecution did not have possession of such matters when the witness was interrogated about them. The rule for determining whether a trial court has erred in its consideration of cross-examination of a character witness in a criminal case is enunciated in *Michelson v. United States*, 335 U.S. 469, 480, 69 S.Ct. 213, 93 L.Ed. 618 (1948), wherein it states:

> "Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations, difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject."

The present record also reveals that the only objection made by defense counsel to the cross-examination of the witness was that a question asked had to do with an event occurring after the alleged commission of the offenses. Defense counsel made no objection to any of the questions on the ground that they denied the defendant a fair trial and were therefore prejudicial. In *United States v. Machado*, 457 F.2d 1372 (9th Cir. 1971), this court had occasion to review a similar contention to the one presented here. In *Machado* the defense counsel objected to a certain question asked

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2. "Did you hear that Dr. Kraude's salary was attached by order of the Superior Court in Los Angeles County for failing to pay alimony to his wife?" [R.T. 599]

3. "Did you know that personnel at Camarillo State Hospital wrote him a letter explaining that it was his obligation to pay that and that if he didn't that would reflect on the hospital? Did you hear that?" [R.T. 599]

by the prosecution of a defense character witness on the ground that it exceeded the scope of the direct examination. The objection was overruled and the witness answered. On appeal, the appellant raised the question of prejudice in regard to the cross-examination of the character witness, the same as appellant has done in this case. The court at page 1375 stated:

> "On appeal, Machado contends for the first time that the questions propounded by the government's counsel were designed 'to adduce hearsay evidence on the issue of his guilt of innocence'. In his view, these 'questions could have no effect other than prejudicing the jury', because a character witness was asked 'whether he had heard that appellant had committed one of the offenses for which he was standing trial'.
>
> As indicated, the ground upon which Machado objects to this cross-examination was not asserted at trial. Such a belated assertion falls within the settled rule that absent the presence of plain error, a basis for objection not raised at the trial level, cannot be urged for the first time in the Court of Appeals."

The trial court in this case, *sua sponte*, instructed the jury concerning the limited purpose of the cross-examination of the character witness[3] and later gave an instruction in regard to character and general reputa-

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[3]"THE COURT: Ladies and gentlemen, perhaps I should explain to you that this witness has testified that she knows the doctor's reputation for truth, honesty, and integrity in the area in which he works and lives.

Now in attempting to counteract that, or testing her opinion, question of this kind may be asked. They may be based on hearsay. They are not introduced as evidence or proof that the

(This footnote is continued on next page)

tion evidence.[4] In *Machado*, supra, after determining that the trial court erred by not properly determining the factual basis of the government's question directed to the defense character witness, this court held such error to be harmless since it was followed by instructions very similar to the ones given in this case.

The final contention of appellant is that he was deprived of his constitutional guarantee to a fair and impartial trial because one of the jurors, a Mrs. Campbell, allegedly concealed the fact that she had been previously employed by the Los Angeles Office of the United States Department of Justice. Appellant contends that Mrs. Campbell, in a telephone call to a Mr. Rogan (an attorney) on December 8, 1971, stated that she had been employed in the Los Angeles Office of the United States Department of Justice and for a number of years had been employed by the Federal Government. According to footnote 27, appearing on page 42 of Appellant's Brief, Mr. Rogan's Affidavit in

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doctor may have been expelled on some other occasion, but merely to test this witness' opinion if she had heard that, and if she had heard it, whether it might have affected her judgment in some way.

These questions must not be asked unless the Government in good faith believes that there is such a rumor or such information abroad which this witness might have heard." [R.T. 596-597]

[4]"Where a defendant has offered evidence of good character or good general reputation for truth and veracity or honesty and integrity or as a law-abiding citizen, the jury should consider such evidence along with all other evidence in the case.

Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of a crime charged may give rise to a reasonable doubt since the jury may think it improbable that a person of such good character with respect to those traits would commit such a crime." [R.T. 998]

Support of Appellant's Motion for New Trial was filed with the United States District Court on January 6, 1972. However, he alleges that through inadvertence, this affidavit was not made a part of the Clerk's Record on Appeal. Appellant requests that this Court take judicial notice of said Affidavit and, in particular, the portion stating that Mrs. Campbell was employed by the Justice Department.

During the voir dire examination of the jury, all members, including Juror Campbell, were asked by the court:

> "Is there anyone else who is employed by the United States Government *now or has been in the recent past.*" [emphasis added]

Mrs. Campbell did not respond to this question. The Court later inquired of Mrs. Campbell personally, as follows:

> "THE COURT: Did you hear all the questions I asked a while ago?
>
> VENIREMAN CAMPBELL: Yes, I did.
>
> THE COURT: And would your answers be in the negative in all respects?
>
> VENIREMAN CAMPBELL: Yes.
>
> THE COURT: You wouldn't have any different answers?
>
> VENIREMAN CAMPBELL: No, I would not."

The above statements of Mrs. Campbell indicate that she was not then and had not been employed in the recent past by the United States Government. To mere-

ly assert that at some time in the past (unknown) this juror had been employed by the Federal Government is not sufficient evidence to justify a reversal of the judgment in this case. In *Daut v. United States,* 405 F.2d 312 (9th Cir. 1968), this Court refused to hear a claim of juror bias when there was no record below establishing the claim of bias and no actual or implied bias was shown.

We conclude that the conviction of appellant should be, and it hereby is, AFFIRMED.

APPENDIX B.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Wesley Kraude, M.D., Defendant-Appellant. No. 72-1584.

On Petition for Rehearing

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge.

Appellant's petition for rehearing herein is denied.

APPENDIX C.

Judgment and Commitment.

United States District Court for the Central District of California.

United States of America v. Wesley Kraude, No. 8577-Criminal.

On this 10th day of January, 1972 came the attorney for the government and the defendant appeared in person and with retained counsel, Richard R. Rogan.

It Is Adjudged that the defendant upon his plea of not guilty and upon a verdict of guilty to counts 1, 2, 3, 5, 12, 15, 16, 19, 20, 22 and 24 has been convicted of the offense of false statement to Government agency in violation of Title 18, United States Code, §1001 as charged in counts 1, 2, 3, 5, 12, 15, 16, 19, 20, 22 and 24 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (3) three years on each of counts 1, 2, 5, 12, 15, 19, 20, 22 and 24 of the Indictment to run concurrently. Execution of sentence suspended and the defendant placed on probation for a period of (5) five years on the following terms and conditions: (1) that he serve (6) six months in a jail-type institution (2) that he obey all laws Federal, State and Local and (3) that he com-

ply with all lawful rules and regulations of the Probation Officer.

It Is Further Adjudged that the defendant to pay a fine unto the United States of America in the amount of $15,000.00. Execution of sentence stayed until January 31, 1972, at 12:00 noon.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Jesse W. Curtis
JESSE W. CURTIS,
United States District Judge.

Filed: January 10, 1972.

Emory G. Hatcher, Clerk.

/s/ N. E. Brockman
By N. E. Brockman, Deputy Clerk.

APPENDIX D.

Q Mr. Bryne, you indicated in your testimony that Occidental Life Insurance Company administers the Social Security program for the United States Government; is that correct?

A That's true.

Q Now, directing your attention to Government's Exhibit No. 14, is that an agreement which authorizes Occidental Life Insurance to act as an agent or department of the United States?

A Yes, it is.

Q What period of time does that document encompass, Mr. Byrne?

A It covers from July 1, 1966, to—well, it would be for a complete year. It would be until June 30, 1967.

Q Now, was that agreement renewed on June 30th?

A It has been renewed each year since until the present time. Of course, we are presently the carrier, also.

APPENDIX E.

Q Now, were Exhibits 15 through 47 received by Occidental Insurance Company in its capacity as the administrator for the Social Security program?

A Yes, they were.

Q They were either received by Occidental Life Insurance Company or prepared by Occidental Life Insurance Company in that regard; is that correct?

A That's true.

Q So it is fair to say that the 1490 Forms are received by Occidental in the ordinary course of business; correct?

A Yes.

Q And the explanation of benefits are prepared by Occidental in the ordinary course of business for Medicare; is that correct?

A That's correct. The Explanation of Benefits form accompanies the check. It is an explanation of benefits that have been paid, and it is produced by the computer, right.

Q Now, it is the business of Occidental Life Insurance Company to receive and process the Form 1490; is that correct?

A Yes.

Q It is also the business of Occidental Life Insurance Company when payment is made to prepare an explanation of benefits to be sent to the beneficiary and the doctor; is that correct?

A That's true.

Q It is also, of course, their business to receive and process the 1490 Form and also prepare the explanation of benefits at or about the date that these forms are received by Occidental; is that correct?

A As soon as we can after we receive them, right.

APPENDIX F.

Q Do you recall having a conference with Dr. Kraude approximately three years ago with respect to the fact Occidental had not paid his claims?

A Yes. Dr. Kraude was in my office.

Q Did he come to your office to discuss the fact that these payments—to see about the payments for these patients?

A I don't recall whether he came in because we weren't paying him for his patients or because of disallowances.

Q To whom would you have turned over the reply to Dr. Kraude's reply in this meeting with you concerning the fact he had not received these payments?

A Possibly one of two assistant managers.

Q Who are they?

A Their names at that time were Steve Zoccoli and Neal Bass.

Q Are they still employed at Occidental?

A They are. They are now managers in the claims department.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-568

WESLEY KRAUDE, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on eleven counts of having violated 18 U.S.C. 1001 by submitting knowingly false requests for medicare payments to an insurance company which was acting as the paying agent for the Social Security Administration. He was sentenced to concurrent three-year prison terms, which were suspended. He was placed on five years' probation on condition that he serve six months in jail; he was also fined $15,000. The court of appeals affirmed (Pet. App. A).

Petitioner contends that the false statements were

not within the "jurisdiction" of a government agency within the meaning of Section 1001 since they were made to the Occidental Life Insurance Company with whom the Department of Health, Education and Welfare had entered into a contract to handle medical claims. He also contends that he was denied a fair trial because one of the jurors allegedly concealed the fact on *voir dire* that she had been previously employed by the Los Angeles Office of the United States Department of Justice. These contentions are answered in the opinion below on which we rely (Pet. App. A, 2-3, 6-8). With respect to the first issue, we point out that neither *United States* v. *Adler,* 380 F.2d 917 (C.A. 2), nor *Friedman* v. *United States,* 374 F.2d 363 (C.A. 8), cited by petitioner (Pet. 10), is in conflict with the decision below, since neither case contains any discussion of whether statements made to an entity under contract with a federal agency are within the "jurisdiction" of the agency within the meaning of 18 U.S.C. 1001.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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